In the Supreme Court of the United States

OCTOBER TERM, 1924

MEYER SELZMAN, PLAINTIFF IN ERROR
v.
THE UNITED STATES
No. 998

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

STATEMENT

Plaintiff in error was convicted in the United States District Court for the Northern District of Ohio of conspiracy, under Section 37, Criminal Code, to violate Title III of the National Prohibition Act, and the regulations made in pursuance thereof, by selling completely denatured alcohol in packages containing less than five wine gallons without having affixed thereto the proper labels. (R. 1, 18.)

He was also convicted under another indictment, consolidated for trial with the above case (R. 15), of selling denatured alcohol under circumstances

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from which he might reasonably have deduced the intention of the purchaser to use said alcohol for beverage purposes, contrary to the provisions of Section 4, Title II, of the National Prohibition Act. (R. 5, 18.)

In the first case, involving the conspiracy statute, plaintiff in error was sentenced to the Atlanta Penitentiary for two years and to pay a fine of $500. (R. 21.) In the second he was sentenced to several terms, to be served consecutively, in the Dayton, Ohio, Workhouse; service to commence at the expiration of the penitentiary sentence imposed in the first case. (R. 21, 29.)

Motions for a new trial, in arrest of judgment, and to modify sentence, were overruled. (R. 23.)

A direct writ of error brings the case here.

THE FACTS

Plaintiff in error, a registered pharmacist, as the testimony tended to show, established a practice in his drug store, by instructions to his clerks and through his own example, of selling, in violation of the regulations, denatured alcohol without the poison label to anyone whose clothing and appearance indicated that he was a derelict and, presumably, of such low social standing that injury to him would not be likely to excite active investigation. Several of plaintiff in error's customers of this character died of alcoholism shortly following their purchases, including one of the purchasers pleaded as such in the indictment.

In passing on the motion to modify sentence the court below said (R. 25):

> A claim that to inflict the extreme penalty on each one of these aggravated sales, under circumstances such as these, is cruel and unusual carries its own answer. It would have been travesty not to have given such a calloused indifference to human suffering the extremest consideration. Death ensuing, with proof of the corpus delicti presented, the situation would have been at least manslaughter at common law and by Ohio statutes murder in the second degree.

THE ISSUES

Plaintiff in error contends that Title III of the National Prohibition Act, relating to industrial alcohol, is unconstitutional, because the taxing power of the Government, as created by statute, extends to the alcohol only until denatured; that after denaturation the alcohol is subject to distribution free from Government supervision or authority; that the Commissioner of Internal Revenue no longer has power or control over it within the scope of the statute under which his pretended authority is claimed, and that therefore the regulations in question had not the force and effect of law; and a prosecution for conspiracy to violate same can not be maintained.

It is also contended that Section 4, Title II, of the Act is unconstitutional, because Congress had no authority, under the Eighteenth Amendment

or otherwise, to penalize the sale of denatured alcohol, a nonbeverage product, for beverage purposes.

ARGUMENT

I

Title III of the National Prohibition Act, and the regulations based thereon, are constitutional and valid

It has long been settled that Congress may direct an administrative bureau to establish regulations to carry legislation into effect, and that such regulations have the force and effect of law. Congress may go farther and provide that a violation of such regulations shall constitute a criminal offense punishable as defined by the statute. *United States* v. *Grimaud,* 220 U. S. 506.

The regulation in question was promulgated in pursuance of Section 13, Title III, of the National Prohibition Act (Chap. 85, 41 Stat. 305), which provides, in part:

> The Commissioner [of Internal Revenue] shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, *to secure the revenue, to prevent diversion of the alcohol to illegal uses,* etc. [Italics ours.]

The regulation violated reads, in part, as follows:

> Every package of completely denatured alcohol containing less than 5 wine gallons, sold or offered for sale by denaturers or dealers, must have affixed thereto a label on which must be printed, in plain, legible letters (red on white), the words, "Completely denatured alcohol," and, in addition, on the same label, there shall be printed in large letters, in red ink, under the skull and bones symbol, the word "POISON," together with the following statement: "Completely denatured alcohol is a violent poison. It can not be applied externally to human or animal tissues without serious injurious results. It can not be taken internally without inducing blindness and general physical decay, ultimately resulting in death." (Art. 108, Regulations 61, United States Internal Revenue, relating to industrial and denatured alcohol, July, 1920.)

It can not be seriously contended that the provision of a label advising of the lethal character of the liquor for internal use is not a wise provision to prevent diversion of the alcohol to illegal uses. In fact, the reasonableness of the regulation, as such, is not attacked. If, therefore, Congress had the power to confer upon the Commissioner of Internal Revenue the duty of devising necessary regulations, the conclusion is inevitable that a violation of the regulation is an offense against the United States. Section 37 of the Criminal Code, making it a crime to conspire to commit an offense against the United States, covers such a situation.

This Court in *Haas* v. *Henkel,* 216 U. S. 462, 479, said:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.

See also *United States* v. *Foster,* 233 U. S. 515.

But it is claimed that the entire Title III of the National Prohibition Act is unconstitutional. It is conceded that the adoption of the Eighteenth Amendment and the enactment of the Volstead Act developed a situation which Title III was intended to solve, and the Government then dealt with the problem of industrial alcohol, not only from the viewpoint of its taxing power but also from the viewpoint of its control over beverage alcohol; that provision is made for the manufacture, withdrawal, and preparation for sale and denaturation of alcohol, and that as to these subjects the Government had full authority and control and the Commissioner could lawfully issue regulations affecting the same, so far as within the scope of his jurisdiction. But it is contended that the tax is collected by the Government at the source of manufacture or denaturation; that when the alcohol in its industrial form leaves Government control the tax has been paid and the taxing interest of the Government ceases from that moment; that, being denatured, the alcohol is a poisonous product, not fit for beverage purposes within the meaning of the

Eighteenth Amendment and the Volstead Act, and that the Government control over it as a beverage must cease from that moment also.

This argument proceeds upon the theory that nonbeverage intoxicating liquor can not be the subject of legislation in an effort to make effective the direction of the Eighteenth Amendment that Congress shall pass "appropriate" laws to restrain the sale of intoxicating liquor as a beverage. In other words, that any provision under the Amendment making it an offense to sell nonbeverage intoxicating liquor for beverage purposes is unconstitutional.

Reduced to its final analysis, the question is whether it was "appropriate" legislation for Congress to include in the National Prohibition Act provisions intending to strike at the diversion of industrial alcohol, a poisonous nonbeverage intoxicant, to beverage purposes.

The Eighteenth Amendment provides that "the manufacture, sale, or transportation of intoxicating liquors within * * * the United States * * * for beverage purposes is hereby prohibited" (Sec. 1); and that "Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation" (Sec. 2).

The National Prohibition Act enacted in pursuance of this Amendment provides that no person shall "manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor" except as authorized in the Act; that

all its provisions shall be liberally construed to the end that "the use of intoxicating liquor as a beverage" may be prevented, and that intoxicating liquor "for nonbeverage purposes" may be manufactured, sold, etc., "but only" as provided in the Act and the Commissioner of Internal Revenue may issue permits therefor (Sec. 3, Title II); that denatured alcohol shall not be subject to the provisions of the Act if "produced and used as provided by laws and regulations now or hereafter in force" (Sec. 4, Title II); that no one shall manufacture, sell, etc., intoxicating liquor without first obtaining a permit from the Commissioner, with exceptions not here material (Sec. 6, Title II), nor manufacture, sell, or transport any liquor without making at the time a permanent record thereof, etc. (Sec. 10, Title II); and that after February 1, 1920, the possession of liquors by any person not legally permitted "under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purposes of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title" (Sec. 33, Title II).

The purpose and effect of the Eighteenth Amendment are now well understood. They are to put an end to the traffic in intoxicating liquors for beverage purposes. See *Grogan* v. *Walker,* 259 U. S. 80, 89. The power of Congress in this respect, as held by this and other courts, is of such breadth and comprehensiveness as to include in

its legitimate application the control and regulation of all means by which the evil sought to be controlled may have operation. The Eighteenth Amendment must be respected and given effect the same as other provisions of the Constitution. *National Prohibition Cases,* 253 U. S. 350, 386.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. (Art. I, Sec. 8, Cl. 18.) In the exercise of such nonenumerated or "implied" powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *Everard's Breweries* v. *Day,* 265 U. S. 545, 559. But, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce the prohibition "by appropriate means." *National Prohibition Cases, supra,* p. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, courts

may not inquire into the degree of their necessity, as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Legal Tender Case,* 110 U. S. 421, 450; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. Nor may courts inquire as to the wisdom of the legislation or the motives of Congress. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161. What courts may consider is whether that which has been done by Congress has gone beyond the constitutional limitation upon its legislative discretion. *Ex Parte Curtis,* 106 U. S. 371, 373.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any appropriate means to make that prohibition effective. An incidental result is to clothe Congress with a police power which theretofore was exercisable only by the several States. Inherent in the enjoyment of such power is the authority of Congress to legislate effectively—to make successfully operative the Amendment—and in so doing the legislation may prohibit acts otherwise and theoretically innocuous. It has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although nonintoxicating. *Purity Extract Company* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264.

This Court by an unbroken line of decisions has "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544. Because legislative acts are presumed to be constitutional, it follows that Congress should be permitted to enjoy exclusively the right to judge the means to effect a constitutional purpose and the necessity which calls forth the employment of such means; that its judgment must stand, unless courts are able to see too clearly to be subject to reasonable criticism that its action is improvident and beyond legislative limitations. *Interstate Railway* v. *Massachusetts,* 207 U. S. 79; *Mugler* v. *Kansas,* 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, 163.

Applying the foregoing principles to the instant case, the Government submits that it can not be said that the provisions of Title III of the National Prohibition Act are so clearly unreasonable as to be beyond the constitutional power of Congress. The limitations and restrictions therein contained, and of which complaint is made, were necessary and appropriate and were clearly adopted for the purpose of preventing the diversion of industrial alcohol for beverage purposes. Denatured alcohol is in fact intoxicating. In spite of its poisonous character, people will use it for beverage purposes, as is shown by this and other cases prosecuted by the Government. Moreover, by redistilla-

tion and other methods the poison may be extracted so as to render the alcohol more palatable and fit for beverage purposes. But, whether regarded as a beverage or nonbeverage intoxicant, the fact remains that it is being used for beverage purposes. In such a situation, it was as much within the power of Congress to enact Title III, in its attempt to pass appropriate legislation, as it was to prevent the traffic in so-called beverage intoxicating liquor. In fact, Title III was as necessary and important to effective prohibition enforcement as was Title II of the Act. Congress sought, in the enactment of the National Prohibition Act, to cover the entire field of an enforcement act that would be reasonably practicable and fully effective. It attempted to pass an act that would make the selling of *any* liquor that was intoxicating, if the sale was for beverage purposes, an offense. Without the enactment of Title III, the Eighteenth Amendment and the provisions of Title II of the Volstead Act, above set forth, could not be enforced. Of a similar situation, with respect to malt liquors, this Court said in the *Everard's Breweries* v. *Day*, 265 U. S. 545, 561:

> The opportunity to manufacture, sell, and prescribe intoxicating malt liquors for "medicinal purposes" opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges, and artifices; aids evasion; and thereby and to that extent ham-

pers and obstructs the enforcement of the Eighteenth Amendment.

So here, but for the provisions of Title III, the constitutional amendment and the National Prohibition Act could not be made effective. By various subterfuges and frauds alcohol intended for industrial purposes would constantly be diverted to beverage purposes. Under these circumstances it seems clear that Congress had power to regulate the distribution of such alcohol, irrespective of whether it is known as a nonbeverage product or whether or when a tax was imposed thereon. The Amendment struck at an evil. The evil is none the less because produced by the sale and use of so-called nonbeverage intoxicants. In other words, the degree of the evil is not dependent upon the potability of the intoxicant.

In view of the decisions of this and other courts, Federal and State, upholding laws prohibiting or regulating the traffic in malt, spirituous and nonintoxicating liquors in order that prohibition may be made effective, there can be no doubt that Congress may regulate the distribution of industrial alcohol in order to prevent its diversion to beverage purposes. Title III is therefore not unconstitutional.

II

Congress had power to penalize the sale for beverage purposes of denatured alcohol, a non-beverage intoxicant

The substance of plaintiff in error's argument is that there is an inconsistency between Section 1,

Title II, of the Act, defining "liquor" or the phrase "intoxicating liquor," and Section 4, Title II, under which plaintiff in error was convicted, and which attempts to penalize the sale for beverage purposes of certain nonbeverage intoxicants as being included in the term "liquor" or the phrase "intoxicating liquor" defined in Section 1, but which are not enumerated therein.

Section 1 reads, in part, as follows:

> When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes.

Section 4 provides, in part:

> The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:
>
> (a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.
>
> * * * * *

> Any person who shall knowingly sell any of the articles mentioned in paragraphs a [denatured alcohol], b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title.

It is urged that because denatured alcohol is a nonbeverage intoxicant, it is excluded from the operation of the Volstead Act by virtue of the definition in Section 1.

The Government submits that the statute can not be read to mean that the word "liquor" or the phrase "intoxicating liquor" should be construed to include only the liquors enumerated and to exclude all other intoxicating liquor. The obvious purpose of Section 1 is to bring within the operation of the statute beverage intoxicants under whatever guise or name, and to define the quantum of alcohol whose presence will determine the intoxicating character for the law's purposes. The section is inclusive and definitive of certain classifications, but not necessarily does its language purport to cover the entire field of intoxicants. So to hold would be

to say that Congress failed to legislate practically and effectively on a subject over which it had complete authority under the Constitution and which had its fullest consideration.

It will be observed that in its enumeration the statute includes alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine. This is an enumeration of the commonly accepted intoxicating liquors, those generally known to the trade and to the people as intoxicating liquors. But at the time the statute was enacted there were no doubt many other intoxicating liquors used in this and other countries for beverage purposes that were not within common knowledge. Clearly one accused of selling such an intoxicant for beverage purposes could not plead immunity merely because Congress has failed to include that particular liquor in its enumeraton. That the enumeration was not intended to be complete is further shown by the fact that, after naming the commonly accepted intoxicating liquors, the statute proceeds: "in addition thereto * * * by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

The ultimate determination of whether this section should be construed as inclusive or exclusive must be based on the Eighteenth Amendment. It provides that the manufacture and sale, etc., of *intoxicating liquors "for beverage purposes is hereby*

prohibited" and Congress shall have power to enforce the Amendment by appropriate legislation. [Italics ours.] To hold that this section includes only the intoxicants therein named would be to admit that Congress, in defining the field of intoxicants, has fallen into a grave error, namely, that of excluding from the operation of the Amendment those intoxicants which ordinarily are not fit for beverage purposes, but which have intoxicating capacity if so used. Such a construction would suggest that Congress has neglected the full performance of its duty and has left open a mischievous field—an opportunity to purvey unpalatable but intoxicating liquors, without any punitive result. It is presumed that Congress approaches its duty in an effort to perform it fully. The construction contended for by plaintiff in error would be an unreasonable one. Certainly it is not forced by the language of the Act. The language is that the words "intoxicating liquor" shall be construed to *include*. There is no necessary inference, in an enumeration of what shall be included in a phrase, that intoxicating liquors not named shall be excluded, especially when the evident purpose of the Act is to cover the whole field of intoxicants.

It is submitted that the statute should not be construed as exclusive, but as intended to include intoxicating liquors other than those specifically named, and especially a nonbeverage intoxicating

liquor sold and used, as in this case, for beverage purposes. This is a reasonable and practical construction of the statute and is consistent with the duty and evident purposes of Congress to employ fully all its powers derived from the Amendment. Statutes should be construed practically, if reasonably possible, so that their purposes may be completely effectuated. Accordingly the Government submits that the word "liquor," wherever its sale for beverage purposes is denounced, should be construed as that liquor which is intoxicating in fact or by legal definition, whatever may be its palatability.

As in the case of Title III relating to industrial alcohol, referred to above, Congress had ample power to enact Section 4, penalizing the sale of denatured alcohol for beverage purposes. By the Eighteenth Amendment Congress was empowered to pass a law making the prohibition of the sale of intoxicating liquors broadly effective. This power necessarily carried with it the authority to enact legislation prohibiting the sale for beverage purposes, whether directly or indirectly, of a nonbeverage intoxicant such as denatured alcohol included in Section 4.

CONCLUSION

It is submitted that the statutes and the regulation under which plaintiff in error was convicted were constitutional and valid, and that the judg-

ment and sentence appealed from should be affirmed.

Respectfully.

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APRIL, 1925.

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